International Union of Operating Engineers Local 487 Health and Welfare Trust Fund *and* Heavy Construction Association of South Florida, Inc.
Case 12–CA–13516

September 15, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On February 5, 1992, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and Charging Party filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent (or Fund) violated Section 8(a)(3) and (1) of the Act by terminating the benefits of employees because they worked for employers who had withdrawn recognition from the Union. The Respondent asserts that it is not subject to the Board's jurisdiction because it is not an ''employer'' within the meaning of Section 2(2) of the Act. For the reasons stated below, we agree with the Respondent that employer status has not been established in this proceeding. Accordingly, we shall dismiss the complaint.

I.

The Respondent is a multiemployer employee welfare benefit plan established in 1969 by agreement of Local 487, International Union of Operating Engineers, AFL–CIO (the Union) and contractor-employers represented by the Heavy Construction Association of South Florida, Inc. (the Association). The plan is subject to the Employee Retirement Income Security Act of 1974 (ERISA), and is administered by a board of trustees which consists of an equal number of union and employer representatives. The chairman of the board of trustees is Minous Shears. Shears also serves as the Union's business manager and chief executive officer.

The declaration of trust, signed by the trustees, provides that they may ''employ or contract'' for the services of an administrative manager. The Respondent contracted with American Administrators to administer the Fund's day-to-day operations. Sue Michael, American Administrators' senior vice president and account representative for the Fund, testified that the Fund had been a client of American Administrators for 7 or 8 years. Prior to August 8, 1989,[1] Michael handled all inquiries regarding benefit eligibility from both employers and employees.

In May, five employers represented by the Association withdrew recognition from the Union. Michael testified that Shears asked her to obtain an opinion from the Fund's attorney as to whether the employees of the companies that ''had gone nonunion'' could continue to receive health and welfare benefits from the Fund. Michael contacted the Fund's attorney and told him that there were several employers who were no longer signatories to contracts with the Union and that the employees who continued to work for those employers were not on the Union's work list. She asked him whether the employees' benefits should continue on the basis of their accumulated hours, or should be discontinued because they were no longer available for work. The attorney replied that the benefits could be terminated. On August 9, Michael terminated the benefits of all employees who were working for nonunion employers, retroactive to June 1.

In finding that the Board has jurisdiction over the Respondent, the judge rejected the Respondent's contention that it is not a statutory ''employer'' because it has no employees. While expressing ''no opinion on the validity of the Respondent's theory that there cannot be a statutory employer without a statutory employee,'' the judge found that the ''factual premise of the argument has not been established'' because Michael and/or American Administrators was an ''employee'' of the Fund.

Contrary to the judge, we find, for the reasons set forth in section II below, that Michael and/or American Administrators is not an ''employee'' of the Respondent. Accordingly, unlike the judge, we find it necessary to address the Respondent's theory that a statutory employer must employ a statutory employee. For the reasons set forth in section III below, we agree with the Respondent.

II.

The Board has historically applied the common law right-of-control test to determine whether one is an employee within the meaning of Section 2(3).[2] This test has been articulated by the Board as follows:

> Under this test, an employer-employee relationship exists where the person for whom the services are performed reserves the right to control

[1] All dates are in 1989 unless otherwise indicated.

[2] In *Roane-Anderson Co.*, 95 NLRB 1501, 1503 (1951), the Board noted that the ''decisive elements in establishing an employer-employee relationship are complete control over the hire, discharge, discipline, and promotion of employees, rates of pay, supervision, and determination of policy matters.''

not only the end to be achieved, but also the means to be used in reaching such end.

Deaton Truck Lines, 143 NLRB 1372, 1377 (1963), enfd. 337 F.2d 697, 698–699 (5th Cir. 1964). This test is based on common law agency principles, and parallels the nonexhaustive criteria for identifying the master-servant relationship as set forth in Section 220(2) of the Restatement (Second) of Agency.[3] The application of this test is not a mechanical one, but depends on the facts of each case.

In finding that Michael and/or American Administrators was an employee of the Fund, the judge noted that the entity for whom Michael and/or American Administrators performed services was the Fund. He further noted that the declaration of trust gave the trustees final authority over the administrator and found nothing in the declaration giving the administrator authority to terminate benefit payments. He further found that Michael acted on the request of trustee Shears in seeking the opinion of the Fund's attorney, thereby initiating the termination of plan benefits, without consulting her own superior in American Administrators.

Applying the right-of-control test to the facts of this case, we find, contrary to the judge, that Michael and/or American Administrators is not an employee of the Fund. In particular, we rely on the following evidence.

First, American Administrators was free to make all decisions concerning the hiring and firing of its personnel, without input or approval of the Fund trustees. There is no evidence in the record that the Fund trustees exercise any control over American Administrators' decisions to discipline, promote, supervise, or compensate its personnel, including Senior Vice President Michael. Indeed, Michael testified that she considers John Day, American Administrators' president and chief operating officer, to be her ''boss.''

Second, American Administrators was free to make all decisions in the routine administration of the Fund, including participant eligibility and employer contributions, without input, approval or ratification by the trustees. As account representative, Michael testified that she was responsible for overseeing the accounts, computers, and a portion of the claims. American Administrators used its own methods, consistent with the requirements set out in the plan documents, and was not required to seek regular direction from the Fund with respect to its duties. Although Shears requested Michael to obtain the Fund attorney's advice regarding the eligibility of the nonunion employees, she terminated the benefits of such employees based on the attorney's advice and without further consultation with or approval from the trustees.

Third, American Administrators provided and maintained its own computers and equipment in administering the day-to-day operations of the Fund and operated from its own offices in Miami, Florida. American Administrators received all mail for the Fund at this address and handled all inquiries regarding eligibility at this office.

Fourth, the Fund did not withhold taxes for American Administrators or any of its personnel.

Finally, during the 7 years that American Administrators serviced the Fund, it remained free at all times to service other clients.

On the basis of the foregoing, we find that Michael was employed solely by American Administrators (and was not also an ''employee'' of the Fund) because the Fund exercised no control over her terms and conditions of employment. We further find that American Administrators had an independent contractor relationship with the Fund (not an employee-employer relationship) because American Administrators controlled the manner and means of performing their tasks. The ''final authority'' of the Fund trustees, relied on by the judge, is directed toward accomplishing the end to be achieved, i.e., the distribution of health and welfare benefits to employees entitled to receive them. Accordingly, we conclude, contrary to the judge, that jurisdiction may not be asserted over the Respondent on the ground that Michael and/or American Administrators was an ''employee'' of the Fund within the meaning of Section 2(3) of the Act.[4] Therefore, it is necessary to turn to the issue the judge did not address—whether

[3] Restatement 2d, *Agency* § 220(2) lists the factors to be considered in determining whether one acting for another is a servant or an independent contractor. These factors include:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether the one employed is engaged in a distinct occupation of business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether the work is part of the regular business of the employer;

(i) whether the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

[4] In his answering brief, the General Counsel acknowledges that ''the Fund may not directly employ employees,'' but asserts that ''it does employ individuals—the six trustees who manage the Fund.'' However, the General Counsel provides no authority for the proposition that the Board may consider the Fund to be an ''employer'' on the basis of its employment of the six managing trustees, and the General Counsel's view is inconsistent with our determination infra that a statutory employer must employ a statutory employee. Accordingly, we find no merit in the General Counsel's contention.

the Fund is a statutory employer despite the absence of any statutory employees.

III.

Section 8(a) of the Act prohibits unfair labor practices committed by ''an employer.'' Section 2(2) of the Act defines ''employer'' as follows:

> The term ''employer'' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

This definition is not particularly helpful in resolving the issue of whether an entity must employ statutory employees to be a statutory employer. Nor has the Board previously addressed this question.[5]

However, the legislative history of Section 2(2) gives a clear indication that Congress contemplated that an ''employer'' would employ ''employees.'' As noted above, excluded from the definition of ''employer'' is ''any labor organization (other than when acting as an employer).'' In *Office Employees Local 11 v. NLRB*, 353 U.S. 313, 317–318 (1957), the Supreme Court stated that this phrase had its origin in a Senate report which offered the following explanation for it:

> The reason for stating that ''employer'' excludes ''any labor organization, other than when acting as an employer'' is this: In one sense every labor organization is an employer, it hires clerks, secretaries, and the like. In its relations with its own employees, a labor organization ought to be treated as an employer, and the bill so provides. [Id., quoting S. Rep. No. 1184, 73d Cong., 2d Sess. 4.]

Thus, Congress believed that a union, which it generally excluded from the definition of an employer, should be treated as an employer when it assumed the attributes of an employer, i.e., it had ''relations with its own employees'' such as ''clerks, secretaries, and the like.''

Furthermore, in *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), the Court examined the legislative history of a related statutory term (''employee'') and stated that Congress did not intend that it be ''stretched beyond its plain meaning.'' Id. at 166. The Court noted that in 1947 Congress amended the Act to exclude independent contractors from the definition of ''employee'' and quoted from a House report explaining the amendment:

> In the law, there always has been a difference, and a big difference, between ''employees'' and ''independent contractors.''''Employees'' work for wages or salaries under direct supervision. . . . It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give to words not far-fetched meanings but ordinary meanings. [Id. at 167–168, quoting H. Rep. No. 245, 80th Cong., 1st Sess. 18 (1947).]

The Court held in *Pittsburgh Plate Glass* that the ''ordinary meaning'' of ''employee'' does not include retired workers because they have ceased to work for another for hire.

Similarly, in the instant case, the ''ordinary meaning'' of ''employer'' does not include an entity that has no employees. Rather, the plain meaning of ''employer'' is one who employs employees to work for wages and salaries.[6] Indeed, we believe it would be ''far fetched,'' and therefore contrary to congressional intent, to hold that an ''employer'' need not employ any employees.

---

[5] Previous cases finding that welfare and pension funds are statutory employers are distinguishable. In those cases, the funds at issue had employees of their own. In none of the cases was a fund charged with an unfair labor practice when it had no employees of its own. See, e.g., *Chain Service Restaurant*, 132 NLRB 960 (1961), enfd. in relevant part 302 F.2d 167 (2d Cir. 1962) (fund employed five employees to perform administrative tasks); *Miners' Welfare, Pension & Vacation Funds*, 256 NLRB 1145 (1981) (fund employed administrator and bookkeepers); *Joint Industry Board of the Electrical Industry*, 238 NLRB 1398 (1978) (fund employed dentists and dental clerical employees); *Teamsters Health & Welfare Fund I*, 233 NLRB 814 (1977) (fund violated Act with regard to its own employees).

The judge relied on *Chain Service Restaurant*, supra, in finding that the Fund met the Board's jurisdictional standards. In that case, the Board found that the trust fund met the Board's discretionary commerce standards based on the fund's purchase of insurance policies, valued in excess of $50,000, for employers who met the Board's jurisdictional standards. In that case, the Board did not have to determine whether a fund must employ employees to be a statutory employer because there, unlike here, the fund had employees of its own.

[6] Black's Law Dictionary (5th ed. 1979) defines ''employer'' as follows:

> Employer. One who employes the services of others; one for whom employees work and who pays their wages or salaries. The correlative of ''employee.''

Finally, we note that the Supreme Court recently stated that when a statute, in that case ERISA, does not helpfully define the term ''employee,'' the Court presumes that Congress means a common law agency definition unless it indicates otherwise. *Nationwide Mutual Insurance Co. v. Darden*, 112 S.Ct. 1344, 60 U.S.L.W. 4242, 4243 (1992). In *Darden*, the Court construed the term ''employee'' to incorporate the traditional agency law criteria for identifying master-servant relationships. Here, similarly, the statute does not helpfully define ''employer'' and, therefore, it would seem appropriate to consider agency law principles.

The Restatement of Agency defines ''Master'' as ''a principal who employs an agent to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service.'' A ''servant'' is ''an agent employed by a master to perform service in his affairs'' and is controlled or subject to the right to control by the master. See Restatement 2d, *Agency* § 2 (1958). Thus, drawing on these agency law definitions, we find that an ''employer'' is one who employs an agent to perform services and retains the right to control the manner and means by which the result is to be accomplished. In other words, an ''employer'' employs an ''employee.''

In sum, consistent with congressional intent, the plain meaning of the term ''employer,'' and traditional agency principles, we find that an ''employer'' is one who employs ''employees'' to work for compensation. Inasmuch as we have found that, so far as the record here shows, the Fund does not employ any statutory employees, we conclude that the General Counsel has not shown that it is a statutory employer, and we shall dismiss the complaint for lack of jurisdiction.[7] We express no view on the merits of the unfair labor practice allegations of the complaint.

ORDER

The complaint is dismissed.

Maria Kaduck-Perez, Esq. and *Eduardo Soto, Esq.*, for the General Counsel.

Joseph H. Kaplan, Esq. and *Angela Nixon, Esq. (Kaplan & Bloom, P.A.)*, of Miami, Florida, for the Respondent.

W. Russell Hamilton III, Esq. (Morgan, Lewis & Bockius), of Miami, Florida, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard by me in Miami, Florida, on October 7, 1991. Thereafter, the General Counsel, the Respondent, and the Charging Party filed briefs. On the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. FILING AND SERVICE OF THE CHARGE, AND ISSUANCE OF THE COMPLAINT

The record contains a copy of an unfair labor practice charge filed on August 18, 1989,[1] by Heavy Construction Association of South Florida, Inc. (the Association), alleging that ''I.U.O.E. Local 487 Health and Welfare Trust Fund'' (Respondent or the Fund), with a listed address of ''1637 N.W. 27th Avenue, Miami, FL 33125,'' had violated Section 8(a)(3) of the National Labor Relations Act (the Act).[2] The record also contains a copy of a standard cover letter signed by the Regional Director for Region 12 sent to the addressee listed above by certified mail, with enclosure of a copy of the charge. Attached to the cover letter is a postal receipt card indicating the same address and signed by a purported agent.[3]

The complaint issued on May 31, 1991, and an amendment on October 4, 1991.[4] It alleges that Respondent, a trust fund created pursuant to a collective-bargaining agreement between the Association and International Union of Operating Engineers Local 487 (the Union), terminated the benefits of certain employees on August 9, 1989, retroactive to June 1, 1989, because the employees were employed by employers which no longer had a collective-bargaining relationship with the Union. The complaint asserts that such action was inherently destructive of rights guaranteed by Section 7 of the Act, and discriminated against the employees in violation of Section 8(a)(1) and (3) of the Act.

The complaint also alleges and the answer denies that the charge had been served on Respondent.

The Fund was established pursuant to the provisions of the Employee Retirement Income Security Act of 1974 (ERISA). That statute provides that service of legal process upon a

[7] In his answering brief, the General Counsel argues for the first time that jurisdiction could be asserted over the Fund on various agency theories. Thus, the General Counsel claims that the Fund is an agent of the employers that contributed to the Fund and that Union Trustee/Union Business Manager Shears was acting as an agent of the Union in causing the allegedly discriminatory termination of benefits. We find that these theories are not properly before us for consideration because they were neither alleged in the complaint nor fully litigated at the hearing. As the judge stated in sec. III,C, par. 1 of his decision: ''The complaint alleges that the Fund itself is an employer engaged in commerce and that it has committed unfair labor practices. This case therefore does not present the issues of whether the Fund is an agent of an employer or a labor organization.'' We note that the General Counsel did not except to this or any other part of the judge's decision.

Citing, inter alia, *Motor Car Dealers Assn.*, 225 NLRB 1110 (1976), the General Counsel also points out that the Board has held multiemployer associations to be employers even though they had no employees of their own. However, as the General Counsel acknowledges, this precedent is based on the theory that when a multiemployer association acts as bargaining agent for its employer-members, the association falls within that part of Sec. 2(2) that refers to a ''person acting as an agent of an employer.'' For the reasons stated above, we find that such an agency theory for asserting jurisdiction over the Fund has not been timely raised in this case.

[1] All dates are in 1989 unless otherwise specified.

[2] G.C. Exh. 1(a).

[3] G.C. Exh. 1(b).

[4] G.C. Exhs. 1(c), 1(h).

trustee or an administrator of an employee benefit plan constitutes service upon the employee benefit plan.[5]

A Summary Plan Description (SPD) of the Fund states that the agent for service of process shall be:

> Board of Trustees
> American Administrators
> 1637 N.W. 27th Avenue
> Miami, Florida 33125[6]

In response to a request for advice from the administrator, the Fund's attorney wrote a letter to it ''c/o American Administrators, Inc.,'' at the same address.[7]

A ''Restated Agreement and Declaration of Trust'' (the Declaration), signed by the trustees of the Fund, provides that they may ''employ or contract'' for the services of an administrative manager[8] and the record establishes that the manager was American Administrators. The Board's Rules provide in relevant part that service of a charge may be made by certified mail and that the return receipt constitutes proof of service.[9]

The Fund was represented by counsel at the hearing, and did not claim surprise or lack of service. Respondent's brief states no reason for its denial that proper service of the charge was made.[10] In the absence of any statement of position or evidence to the contrary, I find that the charge was mailed by certified mail, and was received by the Fund's administrator, which under ERISA constitutes service on the Fund. The Board's Rules do not require service on the trustees of such a fund. The Board has long held that procedural requirements regarding proof of service should be liberally construed, and that when charges have in fact been received, technical defects in the form of service do not affect the validity of service. *Control Services*, 303 NLRB 481 (1991).

I therefore conclude that the charge was properly filed and served on Respondent.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Termination of Benefits*

The record shows that six companies[11] had longstanding collective-bargaining relationships with the Union, which provided for their making contributions to an employee benefit fund. In April 1989, five of them[12] designated the Association as their collective-bargaining representative and, in May 1989, withdrew recognition from the Union. The sixth company, Mantell, has not executed a collective-bargaining agreement with the Union.[13] The Union picketed these companies. The Fund continued to pay benefits to the employees of these companies until August 9.

American Administrators' senior vice president and account representative for the Fund was Sue Michael. She testified that, the Fund had been a client of American Administrators for 7 or 8 years.[14] Prior to August 8, a representative of one of the companies that had withdrawn recognition from the Union (Marks) called Michael and asked her what would happen to the insurance benefits of his employees. Michael replied that they would continue to be covered ''as long as their hours were sufficient.''[15] Individual employees made similar inquiries.

There were six trustees of the Fund, three from the Union and three from the employers. The chairman of the board of trustees was Minous Shears, who was also the Union's business manager and chief executive officer. Sue Michael testified that Shears called her and asked her to get an opinion from the Fund's attorney as to whether the employees of the six companies that ''had gone nonunion'' could continue to receive benefits from the Fund. Michael did not discuss the matter with any other trustee. She asked the Fund's attorney whether benefits for such employees should continue on the ground that they had ''accumulated hours,'' or should be discontinued on the ground that they were no longer ''available for work.'' Counsel replied by letter dated August 8, 1989, that the benefits could be terminated.[16] Michael testified that this interpretation was made by counsel and by Shears.

The Union sent Michael a list of 56 names of employees who were working for nonunion companies.[17] Michael terminated the benefits of all employees on the list, retroactive to June 1, and sent letters dated August 9 to those for whom she had a correct address.[18] She did so solely on the basis of the list provided to her by Shears, and did not discuss the matter with any other trustee nor conduct an independent investigation.

Michael was asked the reason for the terminations, and answered that she was told that the employees were no longer ''available for work.'' Asked the reason that they were thus unavailable, Michael responded that the employees ''were working for a nonunion company, but the main reason was that they were no longer available for work.'' Michael testified that this was the first time that an employee's benefits had been terminated because he was not working for a contributing employer.

The parties stipulated that at least one of the employers that had withdrawn recognition from the Union began covering the alleged discriminatees under an existing health plan.

---

[5] 29 U.S.C. § 1132(d). The statute reads:

> An employee benefit plan may sue or be sued under this title (ERISA) as an entity. Service of summons, subpoena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity assuch shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service.

[6] G.C. Exh. 4, p. iii.

[7] G.C. Exh. 10.

[8] G.C. Exh. 2, p. 15.

[9] Sec. 102.111, Board's Rules and Regulations.

[10] R. Br.

[11] Bob Young, Inc. (Bob Young), Central Florida Equipment Rental (Central Florida), Mantell Engineering Contractors, Inc. (Mantell), Marks Bros. Co. (Marks), Rose Septic Tank Co., Inc. d/b/a Rose Engineering Contractors (Rose), and Williams Paving (Williams).

[12] Bob Young, Central Florida, Rose, Marks, and Williams.

[13] G.C. Exh. 5.

[14] At the time of hearing, the Fund had another administrator.

[15] See infra sec. B,2,a.

[16] G.C. Exh. 10.

[17] G.C. Exh. 12.

[18] Of the employees whose benefits were terminated, 53 were the subject of internal union charges resulting in their suspension from membership and fines of $2000.

B. *The Eligibility Rule, its Interpretation and Application*

1. Documentary evidence of the eligibility requirements

The Fund has been in existence for many years. Although some of the witnesses testified about the intentions of the draftsmen of other funds, none testified about the intentions of draftsmen of the Fund in issue in this proceeding.

The language describing the Fund is set forth in several documents. One is the declaration described above, which is signed by the Fund's six trustees, together with an amendment.[19]

The record also contains a ''Group Insurance Program and Summary Plan Description'' (SPD). This document contains two sections, each stating that it is not a part of the ''Certificate of Insurance.''[20]

Section 2 of the SPD has a subsection entitled ''Eligibility Rules,'' a new employee becomes eligible for benefits at the beginning of his seventh month of employment with a contributing employer who has made a minimum of 800 hours in contributions during the prior 6-month period.

Continued eligibility for a particular month—the ''eligibility month''—is established by the employer's supplying at least 600 hours of contributions during the ''contribution period.'' The latter is found by counting backward 5 months from the eligibility month, and then another 6 months.[21] The rule provides that ''[a]ll eligible employees who satisfy a minimum hour requirement of 600 hours during the corresponding six month contribution period will continue to be eligible during the respective eligibility month.''[22]

Section two also contains a subsection entitled ''Termination.'' This provides that ''[e]ligibility for benefits will terminate on the first day of the eligibility month following the corresponding contribution period in which the employee has not accumulated 600 hours,'' or, if earlier, the date the employee enters full-time military service, or the date ''the Plan terminates.''[23]

The right to ''terminate'' a plan is reserved to the board of trustees and to the employers and the Union who are signatories to the plan's trust agreement. This may be done regarding a particular employer when he ceases to be a contributing employer or is declared by the board of trustees to be in default. A particular employee may be terminated when he ceases to be an ''eligible'' employee. In the event of termination, the board of trustees will provide that all remaining plan assets be used in a manner which best carries out the basic purpose for which the plan was established.''[24]

A preamble to the ''Certificate of Insurance'' (the Certificate) states that it contains the ''essential features'' of the policy, but ''is not and will not become the contract of insurance.'' The language interpreted by the Fund's attorney comes from the certificate and reads as follows:

> ELIGIBLE CLASS OR CLASSES OF EMPLOYEES
>
> You are eligible for insurance if you are an employee of a contributing employer and perform work which is under the jurisdiction of and under the terms of the collective bargaining agreements creating the International Union of Operating Engineers Local Union 487 Health and Welfare Trust Fund, provided that sufficient employer contributions are made on your behalf.
>
> . . . .
>
> TERMINATION OF INSURANCE (EMPLOYEES)
>
> Your insurance ends when the first of these events takes place:
>
> . the date the group policy ends.
>
> . the date the group policy is changed to end insurance for the class to which you belong.
>
> . the premium payments for your insurance are discontinued.
>
> . the date you enter the armed services, or
>
> . the date you fail to meet any continuing eligibility requirements.[25]

The declaration signed by the trustees states that the Fund was created for the benefit of ''participants and their beneficiaries.''[26] A ''participant'' is defined as ''any Employee or former Employee of an Employer who is or may become eligible to receive a benefit if any type.''[27]

2. Interpretations of and justification for the eligibility requirements, and conclusions

a. *Summary of the evidence*

Pursuant to Trustee and Business Manager Shears' request, Plan Administrator Michael sent the Fund's attorney a copy of the language of the certificate, quoted above. There is no evidence that she sent a copy of the language on the same subject from the SPD. The letter from the Fund's attorney quotes the certificate language, and continues:

> Apparently, there are employees who are now working for employers which are not contributing employers or who are not available for work with contributing employers. The question is, can the Trust Fund terminate benefits for such employees (of course, with COBRA rights staying in effect).

---

[19] G.C. Exh. 4, pp. (i)-(vii).

[20] Ibid.

[21] The following examples are given in the SPD (G.C. Exh. 4, p. (iii):

600 Hours During Contribution Period	*Eligibility Month*
February-July	January
March-August	February
April-September	March

[22] Ibid.

[23] The SPD (ibid.) gives the following examples:

Less than 600 hours During Contribution Period	*Termination Date*
February-July	January 1
March-August	February 1
April-September	March 1

[24] Ibid., p. vii.

[25] Ibid., p. 8. This section does not state what constitutes ''sufficient employer contributions.''

[26] G.C. Exh. 2, p. 5.

[27] Id. p. 3.

> In my opinion, the answer to this question is affirmative. The Trust Fund may terminate benefits under these conditions.[28]

Michael was asked to explain the same language. She testified that, in order to determine whether an employee was eligible, she would have to consider the hours of contributions specified in section 2 of the SPD. Michael was unable to find the requirement of ''available for work,'' or a rule that an employee working for a noncontributing employer was not available for work, anywhere except in the attorney's letter. She affirmed that an employee who had been laid off and was not working anywhere would be entitled to benefits provided that he had the required hours during the contribution period. She gave similar advice to one of the companies that withdrew recognition from the Union.

Union Business Manager/Trustee Shears declared that he considered an employee ''available to work'' if the employee signed the Union's out-of-work list. If the employee did not do so, he was not entitled to benefits, regardless of the number of hours in his contribution period. Shears attempted to get several of the employees who went with nonunion companies to sign the out-of-work list, without success.

Shears further testified that he found jobs for some of the employees of the companies that withdrew recognition from the Union. These jobs were in other cities, and with employers who themselves did not make contributions to the Fund, although they had collective-bargaining agreements with sister locals of Local 487. Shears explained this action on the ground that the individuals were unemployed, and had signed the Union's out-of-work list. However, Shears further stated that ''at least one'' of these employees transferred to another union and was taken off the out-of-work list. Shears believed but was not certain that his ''6 month eligibility had expired.'' The administrator was not notified that the employee was no longer on the out-of-work list.

Leon Joyner, an actuary and the Fund's consultant, testified that he advised the trustees to ''terminate'' the plans of the noncontributing members. According to Joyner, this advice was given to the trustees in September 1990, i.e., after the benefits of the alleged discriminatees had already been terminated.

Joyner asserted an economic reason for the termination—the position of the remaining participants would be better if the rights of those working for noncontributing employers were terminated. Joyner claimed that when employees stopped working for contributing employers, they ''ceased to be participants.''[29]

Joyner stated his ''understanding'' that the plans of the noncontributing employers had been terminated. However, he was unaware of any filings with the Secretary of Labor with respect to such terminations or that any action had been taken by the Board of Trustees to declare a particular employer in default. ERISA requires an administrator of a fund that is ''winding up its affairs (without regard to the number of participants remaining in the plan'' to file a report with the Secretary of Labor.[30] The Fund's annual return for the year ending March 31, 1990, filed pursuant to ERISA and the Internal Revenue Code, denies that the plan had been terminated or amended, and denies that there had been any retroactive reduction of benefits of a participant as a result of amendment of the plan.[31] There is no evidence of termination of the plan for any employer in Michael's testimony. I conclude that there was no such formal termination.

Joyner and another actuary, James McKeough, testified that the purpose of terminating noncontributing employers is to preserve the economic viability of the plan. They asserted that individuals whose benefits are scheduled to terminate would tend to claim benefits in greater amounts if given a 6-month period of entitlement after which their right to benefits would terminate. Other than a recitation of what happened to a personal friend of McKeough, there is no objective evidence to support this claim. It may be noted that each employee had to be credited with 800 hours of contributions during the first 6 months of employment before becoming entitled to benefits. The plan's tax return for the year ending March 31, 1990, shows an increase in net assets of over $150,000 to just under $1.5 million.[32] Minous Shears, a trustee for many years, could not recall whether the eligibility rule was adopted for economic reasons.

b. *Conclusions*

I conclude that the eligibility rules applied by American Administrators were those set forth in the SPD rather than the certificate. Plan Administrator Sue Michael explicitly testified that she would have to consider the contribution hours required by the SPD in order to determine whether an employee was eligible for benefits. These contribution requirements are not set forth in the certificate.

Michael's answer to an employer who inquired about termination and her testimony at the hearing show that she applied the SPD rules to continued eligibility and termination of benefits. Thus, the SPD continued eligibility as long as the employee had the required contribution hours, and terminated it only when these requirements were not met.[33] Consistent with these rules, Michael testified that an employee who had been laid off would continue to be covered as long as he had the required contribution hours. Trustee Chairman Shears, in commenting on a member who had transferred to another union and thus left the out-of-work list, stated that he did not know whether the individual's ''6 months of eligibility had expired.''

It follows that the opinion of the Fund's attorney applied to rules which were not actually being utilized by the plan's administrator. The differences between the SPD and certificate requirements are significant. In place of the SPD provision that continued eligibility is established by the employer's supplying the required contributions during the applicable period, the certificate incorporates requirements about working under the Union's jurisdiction pursuant to a collective-bargaining agreement, provided that the employer supplies ''sufficient contributions''—but fails to state what they are.

In place of the simple SPD provision that benefits terminate on the first day of the sixth month following the absence of sufficient contributions during the contribution pe-

[28] G.C. Exh. 10.

[29] Cf. fn. 27, supra, and related text.

[30] 29 U.S.C. § 1021(c)).

[31] G.C. Exh. 14.

[32] Ibid.

[33] Full-time military service or ''plan termination'' also ended benefits.

riod, the certificate terminates benefits on the occurrence of various events, including failure to meet ''any continuing eligibility requirement.'' Respondent ties this language to the certificate's eligibility requirements, and concludes that the alleged discriminatees were not eligible because they were no longer working under the jurisdiction of the Union pursuant to a contract creating the Fund. However, this was not the rule administered by the Fund's administrator.

As Shears admitted, benefits were continued for employees who worked for out-of-state employers who did not contribute to the Fund. This is inconsistent with Respondent's theory of eligibility. Shears' explanation— that these employees signed the Union's out-of-work list and were thus ''available for work''—is a rationalization and apparently is the source of the Union's strained ''out-of-work'' interpretation of the certificate's language. Neither the ''available for work'' language nor signing an out-of-work list as evidence of such availability appears anywhere in the SPD or the certificate. Further, the evidence shows that the Fund did not consistently apply the rule which it announced at the hearing. In fact, there is no evidence that it applied the rule to anybody except the alleged discriminatees herein.

The evidence is insufficient to establish that any of the events terminating benefits under the SPD or the certificate took place. It is also insufficient to establish that the alleged discriminatees' benefits were terminated to maintain the economic integrity of the Fund.

Fund Consultant Joyner testified that he was unaware of any termination of benefits before or after 1989 because the employee went to work for a nonunion employer. Sue Michael testified that this was the first time that an employee's benefits had been terminated because he was not working for a contributing employer. Michael further affirmed that the benefits were terminated because the employees were working for nonunion companies and also because they were unavailable for work. The evidence supports her first conclusion, but not the second.

III. RESPONDENT'S STATUS AS A STATUTORY EMPLOYER

A. *Summary of the Pleadings and Evidence*

The complaint[34] alleges and Respondent's answer[35] admits that during calendar year 1988 Respondent received monetary contributions in excess of $50,000 annually from the employers, including Williams Paving; that the Fund has provided services valued in excess of $50,000 to said employers, and that Williams Paving, a Florida corporation with a place of business in Miami, Florida, has been engaged in the business of paving, grading, and site preparation. At the hearing, Respondent amended its answer so as to deny that it provided services to employers.

The amendment to the complaint[36] alleges and Respondent stipulated that the employers, corporations with places of business in south Florida, have been engaged as contractors in the construction business, and that during calendar year 1988 they purchased and received at their Florida facilities goods and materials valued in excess of $50,000 directly from suppliers located outside the State of Florida.

Respondent stipulated that during calendar year 1988, two of the employers each contributed in excess of $50,000 to the Fund, pursuant to the collective-bargaining agreement. Other evidence establishes that in each of the two fiscal years ending March 31, 1989, and 1990, Respondent received in excess of $1 million in contributions from employers and in excess of $100,000 in interest income.[37]

Minous Shears testified that the Fund never had any employees or paid any salaries. Sue Michael affirmed that she was employed by American Administrators, and that the Fund had been a ''client'' of American Administrators for 7 or 8 years. She identified a superior officer of American Administrators.

The declaration states in relevant part:

> Section 5.1 Conduct of Trust Business. The Trustees shall have general supervision of the operation of this Trust Fund and shall conduct the business and activities of the Trust Fund in accordance with this Trust Agreement and applicable law. The Trustees shall hold, manage and protect the Trust Fund and collect the income therefrom and contributions thereto.[38]

The trustees have authority to procure insurance for participants in the plan,[39] and as noted, the employers provide contributions on behalf of the employees.

The declaration gives the trustees authority ''to employ or contract for'' the services of an individual, firm or corporation, to be known as ''administrative manager.''[40] The latter has designated duties, including those ''directed'' by the trustees, and others.[41]

B. *Positions of the Parties*

Respondent argues that it is not a statutory ''employer'' because it has no ''employees.'' In support of this argument, the Fund cites the legislative history and case law on the definition of ''employee.'' ''Employees work for wages or salaries under direct supervision. . . . It is inconceivable that Congress when it passed the Act, authorized the Board to give to every word in the Act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give to words not far-fetched meanings but ordinary meanings.''[42]

Addressing next the definition of ''employer,'' Respondent cites dictionary definitions suggesting that an ''employer'' is one who pays wages or salaries.

Finally, Respondent refers to cases where the Board has held that trust funds were statutory employers who had vio-

[34] G.C. Exh. 1(c).
[35] G.C. Exh. 1(g).
[36] G.C. Exh. 1(h).
[37] G.C. Exh. 14, p. 6 of Form 5500, p. 3 of auditor's report.
[38] G.C. Exh. 2, p. 12.
[39] Ibid.
[40] Id. p. 15.
[41] Office administration, preparation of reports, collection of contributions, and custody of documents. Ibid.
[42] H. Rep. No. 245, 80th Cong., 1st Sess. 18 (1947), cited in *Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 167 (Br. Ct., 1971), R. Br. p. 16.

lated the Act,[43] and argues that they had done so with respect to their own employees.[44]

The Fund also refers to *A. M. Steigerwald*, 236 NLRB 1512 (1978), and concedes that it may stand for the proposition that an entity such as a trust fund (in Steigerwald, a credit union) may be liable for misconduct toward employees other than its own. Respondent argues, however, that the credit union had its own employees, and was therefore a statutory employer.

The General Counsel cites the same cases, and others.[45] Because Board law holds that an employer may discriminate against employees other than its own, the General Counsel argues that it is of ''no import'' that the Fund itself had no employees.[46]

C. *Conclusion*

It will be useful to distinguish issues which are not present in this proceeding. The complaint alleges that the Fund itself is an employer engaged in commerce and that it has committed unfair labor practices. This case therefore does not present the issues of whether the Fund is an agent of an employer or a labor organization.[47]

In the leading case on the issue of whether such a trust fund is an employer, the Board held that the trust fund's purchase of insurance policies for the employers' employees constituted services rendered to the employers. Since the employers met the Board's jurisdictional standards, the trust fund was found to be an employer engaged in commerce. *Chain Service Restaurant*, 132 NLRB 960, 975 (Conclusion of Law 1). The Court of Appeals for the Second Circuit rejected the trust fund's arguments to the contrary, and accepted the Board's position. *NLRB v. Chain Service Restaurant*, 302 F.2d 167, 173–174 (2d Cir. 1962).

The facts herein show that the Fund procures insurance policies for the benefit of participants, employees of the employers, and that the employers make contributions therefor. The employers themselves meet the Board's direct inflow standard, and, accordingly, the Fund also meets the Board's jurisdictional standards. *Siemons Mailing Service*, 122 NLRB 81, 85 (1958).[48]

The next issue is Respondent's contention that it is not an ''employer'' because, it asserts, it has no ''employees.'' The Act states that ''the term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicity states otherwise,'' with other inclusions and specific exclusions.[49]

The term '''employer' includes any person acting as an agent of an employer, directly or indirectly,'' with specified exclusions.[50]

It is the Board's responsibility to determine whether an employer-employee relationship exists within the meaning of these definitions. It has announced the following standard in resolving problems of this nature:

> The Board, in conformity with congressional intent, has followed the usual tests of the law of agency and has applied the common law ''right of control'' test. Under this test, an employer-employee relationship exists where the person for whom the services are performed reserves the right to control not only the end to be achieved, but also the means to be used in reaching such end. *Deaton Truck Lines*, 143 NLRB 1372, 1377 (1963).

It is obvious in this case that the entity for whom Michael and/or American Administrators performed services was the Fund. It is also obvious from the declaration that the trustees retained final authority over the administrator. Indeed, under the language of the declaration, the trustees may have ''employed'' the administrator. There is nothing in the declaration giving the administrator authority to terminate benefit payments. Finally, the facts show that Michael acted upon the instruction of the chairman of the board of trustees in terminating the benefits. There is no evidence that she consulted her own superior in American Administrators before doing so.

I therefore conclude, under the ''right of control'' test, that Michael and/or American Administrators was an ''employee'' of the Fund. In doing so, I express no opinion on the validity of Respondent's theory that there cannot be a statutory employer without a statutory employee. I merely conclude in this case that the factual premise of the argument has not been established. Shears' contrary testimony is simply an erroneous legal opinion.

Since the evidence shows that the Fund meets the Board's jurisdictional standards, I find that it is an employer engaged in commerce within the meaning of the Act.

IV. LEGAL ANALYSIS AND CONCLUSIONS

The General Counsel has the burden of establishing a prima facie case that is sufficient to support an inference that protected conduct was a motivating factor in Respondent's decision to terminate the benefits of the employees. Once this is established, the burden shifts to Respondent to demonstrate that the terminations would have taken place even in the absence of the protected conduct.[51]

It is well established that the alleged discriminatees were exercising their statutory rights in choosing to work for nonunion employers. As set forth above, the evidence shows that the employees' benefits were terminated because they chose to work for these employers. The purported rules advanced by the Fund to justify the termination of benefits are nowhere to be found in the documents establishing the Fund, and were not in fact the rules applied by the Fund's adminis-

---

[43] *Oregon Teamsters' Security Plan Office*, 119 NLRB 207 (1957); *Miners' Welfare, Pension & Vacation Funds*, 256 NLRB 1145, fn. 1, 1156 (1981); *Chain Service Restaurant*, 132 NLRB 960 (1961), enfd. in relevant part 302 F.2d 167 (2d Cir. 1962).

[44] R. B. p. 18.

[45] *Joint Industry Board of the Electrical Industry*, 238 NLRB 1398 (1978); *International Shipping Assn.*, 297 NLRB 1059 (1990); and *Teamsters Health & Welfare Fund I*, 233 NLRB 814 (1977).

[46] G.C. Br. p. 5.

[47] Cf. *Garland-Sherman Masonry*, 305 NLRB 511 (1991); *Commercial Property Services*, 304 NLRB 134 (1991).

[48] See also cases in the prior section cited by General Counsel and Respondent.

[49] Sec. 2(3).

[50] Sec. 2(2).

[51] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 662, 989, approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

trator. There is no evidence that the benefits of other employees had ever been terminated for working for a nonunion or noncontributing employer. The purported rules were not administered uniformly, and benefits were continued for other employees working for noncontributing employers. The Fund's explanation for this inconsistency—equating the signing of an out-of-work roster with availability for work—simply revealed further lack of uniformity in administration of this purported rule. It is well established that the administration of work rules selectively applied so as to affect only protected activity constitutes evidence of discriminatory motivation.

Although the employees affected by the benefit termination were not the Fund's employees, an employer may violate Section 8(a)(3) and (1) of the Act not only with respect to its own employees but also by actions affecting employees that do not stand in an immediate employer-employee relationship with it. *International Shipping Assn.*, 297 NLRB 1059 (1990).

The General Counsel has thus established a prima facie case that the alleged discriminatees' benefits were terminated because they exercised their statutory right to work for a nonunion employer, i.e., that the terminations were unlawfully motivated.

Respondent has not met its burden of proving that it would have terminated benefits in the absence of the protected activity. Its reliance on an ''eligibility rule'' has no merit for the reasons given above. It has not established a legitimate business reason for the terminations, i.e., preservation of the economic integrity of the Fund. There is no evidence that any of the ''rules'' in the record— either the one advanced by Respondent or the one actually administered by the administrator—was promulgated in order to preserve the Fund's economic integrity. The advice of the Fund's actuarial consultant that termination was necessary for this purpose was not given until after the benefits had already been terminated. The opinions of Respondent's witnesses—that continued paying of benefits to the departed employees would be economically detrimental—is not supported by objective evidence. The Fund's net worth actually increased during the period when benefits were terminated. There is no way of knowing whether this increase was caused in part by the terminations. However, since the Fund's normal practice was to continue benefits for departed employees until their eligibility—established by prior employer contributions—had expired, the termination of benefits resulted in a windfall to the Fund to the extent that it did not pay benefits which it otherwise would have paid.

The General Counsel and the Charging Party agree with the reasons set forth above in determining that Respondent's conduct was unlawful. The General Counsel supplies an alternative rationale, indeed, it appears, his primary rationale. Thus, the General Counsel analogizes the discriminatees to striking employees, and applies the test announced by the Board in *Texas, Inc.*, 285 NLRB 241 (1987), to the discontinuance of benefit payments to disabled employees on commencement of a strike, and by the Supreme Court in *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967). Under this rationale, according to the General Counsel, he has established that Respondent's conduct was ''inherently destructive'' of employee rights or was motivated by antiunion animus. Further according to the General Counsel, this conduct had an ''adverse effect'' on the employees' Section 7 rights and Respondent has submitted no legitimate business justification for the terminations.[52]

Although I do not consider this rationale inapplicable to the facts in this case, it is unnecessary to rely on it in light of my findings.

The complaint alleges that the benefits of 59 employees were unlawfully terminated, and the evidence establishes the names of 56 of these individuals.[53] However, Plan Administrator Sue Michael testified that American Administrators compiled a computer generated list of all employees whose benefits had been terminated. According to Michael, this list and other files were turned over to American Administrator's successor as the Fund's administrative manager, First Benefit Company.

I shall defer to the compliance stage of this proceeding the determination of the names of individuals in addition to those already listed whose benefits were unlawfully terminated.

In accordance with my findings above, I make the following

CONCLUSIONS OF LAW

1. The Respondent, International Union of Operating Engineers Local 487 Health and Welfare Trust Fund, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Various employers are required to make contributions into the aforesaid trust fund pursuant to collective-bargaining agreements which they have with International Union of Operating Engineers Local 487.

3. Six employers previously signatory to collective-bargaining agreements with the Union withdrew their recognition of the Union in the spring of 1989.

4. Various employees of these employers engaged in the protected activity of continuing to work for them after the employers' withdrawal of recognition from the Union.

5. On August 9, 1989, Respondent terminated the benefits of the aforesaid employees because they continued to work for the employers that had withdrawn their recognition of the Union.

6. Respondent's terminations of the benefits of employees because they engaged in protected activity discriminated against them with respect to a term or condition of employment, encouraged union membership, and constituted unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

7. Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Inasmuch as I have found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative actions designed to effectuate the purposes of the Act.

[52] G.C. Br. pp. 12–14. The General Counsel also cites *Texaco, Inc.*, 291 NLRB 508 (1988); *Texaco, Inc.*, 291 NLRB 613 (1988); *Nuclear Fuel Service*, 290 NLRB 309 (1988); *Energy Cooperative*, 290 NLRB 635 (1988); *Gulf Oil Co.*, 290 NLRB 1158 (1988); and *Youngstown Steel Door Co.*, 288 NLRB 949 (1988).

[53] G.C. Exh. 12.

The General Counsel recommends a make-whole order that would compensate the discriminatees for any losses they may have suffered as a result of Respondent's unlawful discontinuance of their medical insurance.[54] As noted, there is record evidence of the names of 56 discriminatees, whose names appear on Appendix A hereto (not published), and I am deferring to the compliance stage of this proceeding determination as to any additional individuals.

It is customary to include reimbursement of substitute health insurance premiums and out-of-pocket medical expenses in make-whole remedies for benefits lost.[55] However, the record shows that some of these expenses may already have been paid by employers who provided substitute coverage under existing health plans. There is no reason for duplicate benefit payments, and, accordingly, the amounts otherwise found to be due from the Fund to employees should be reduced by the amount of such payments under the substituted coverage. The Fund's liability should further be limited by each employee's remaining eligibility at the time his right to coverage was terminated. The Fund should be required to pay interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[56]

The Charging Party recommends that Respondent should also be required to make whole those employers who provided the discriminatees' replacement health care coverage during the periods for which they would have been eligible during Respondent's plan but for its unlawful termination of coverage.

In support of this recommendation, the Charging Party advances several arguments. It notes the Board's broad remedial powers under Section 10(c) of the Act, and cites *Shepard v. NLRB*, 459 U.S. 144 (1983). The Association points to the fact that such expenses incurred by an employee as a result of employer wrongdoing are included in a backpay order. *Quantec, Inc.*, 298 NLRB No. 118 (June 18, 1990). Union wronging toward employers is appropriately remedied by requiring the union to reimburse the employers.[57] The Charging Party also notes the Board's requirement that an employer pay a union's litigation expenses in certain circumstances.[58]

The Association next argues that the employers who provided replacement coverage were merely ''stepping into the shoes'' of the employees, who clearly are entitled to direct reimbursement from Respondent (as I have found). The Charging Party cites ''analogous situations'' where courts have recognized the right of a third party to obtain relief derivatively under other federal laws.[59]

The Charging Party advances policy arguments in favor of the recommended remedy. First, failure to reimburse the employer for the costs of substituted coverage would be a disincentive for such coverage, and would place the employee on his own resources to pay for medical care. This, in turn, would ''coerce'' him toward refraining from exercising his Section 7 rights. Second, medical care, once lost, may result in irreparable damage, and there is a national policy against gaps in medical coverage. Employers who provide protection against such gaps should be encouraged and assisted. Third, if the employee assigns his insurance rights to the provider of medical services, the latter can recover, and the employer should be in the same position. Fourth, if the Fund is not ordered to make those payments which it would have been required to make absent its own wrongdoing, it will profit financially from that wrongdoing.[60]

Although these arguments are not of equal cogency, collectively they are persuasive. Determination of an expense attributable to a discriminatee who has been included in an existing health care plan with nondiscriminatees may present accounting problems, but these can be resolved in supplemental proceedings. Accordingly, I shall recommend that the Board accept this policy, and require Respondent to make whole those employers who provided substituted health care coverage, with interest as described above, to the extent that the employee had continuing eligibility when Respondent terminated his benefits.

Inasmuch as Respondent has no office visited by the discriminatees, I shall recommend that notices be mailed to each discriminatee at his or her last known address.

[Recommended Order omitted from publication.]

---

[54] G.C. Br. pp. 17–18.

[55] *G. Zaffino & Sons*, 289 NLRB 571 (1988); *Best Glass Co.*, 280 NLRB 1365 (1986).

[56] Interest on and after January 1, 1987, shall be computed at the ''short-term Federal rate ''for the underpayment of taxes as set out in the 1986 amendment to U.S.C. sec. 6621.

[57] *Teamsters Local 814 (Santini Bros.)*, 208 NLRB 184 (1974); *Sheet Metal Workers Local 223 (Continental Air Filters Co.)*, 196 NLRB 55 (1972); *Carpenters Local 964*, 181 NLRB 948 (1970); *Sheet Metal Workers Local 80*, 161 NLRB 229, 238 (1966).

[58] *Tidee Products*, 194 NLRB 1234 (1972); *Heck's Inc.*, 215 NLRB 765 (1974).

[59] *Misic v. Building Service Employees Health*, 789 F.2d 1374, 1377–1379 (9th Cir. 1986) (ERISA); *Klamath-Lake Pharmacy v. Klamath Medi. Serv. Bureau*, 701 F.2d 1276, 1282–1283 (9th Cir. 1983) (antitrust laws); *Martin v. Morgan Drive Away*, 665 F.2d 598, 602 (5th Cir. 1982 (same); U.S. v. $364,960.00 in U.S. Currency, 661 F.2d 319, 326-327 (5th Cir. 1981) (Federal forfeiture laws); *Nissho-Iwai Co. v. M/T Stolt Lion*, 617 F.2d 907, 912 (2d Cir. 1980) (Carriage of Goods by Sea Act).

[60] C.P. Br. pp. 14–20.